IN THE

Supreme Court of the United States

October Term, 1977

No. 77—392

SWEENY INDEPENDENT SCHOOL DISTRICT, et al.,

v.

MILDRED HARKLESS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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I N D E X

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STATEMENT OF THE CASE

A. The Proceedings Below On the Merits

This action was brought in May of 1966 by twelve black teachers whose contracts with the Sweeny Independent School District were not renewed for the 1966-67 school year. Respondents are ten of the original plaintiffs, the remaining two having withdrawn prior to the 1969 trial. Plaintiffs sought to bring this action as a class action on behalf of themselves and the five other black teachers who were discharged, but the

District Court denied class action status. Plaintiffs charged in their complaint that defendants, petitioners here, had refused to retain them because of their race and sought reinstatement, back pay and lost allowances, and their costs including reasonable attorneys' fees.

Prior to the 1966-67 school year, the Sweeny Independent School District maintained a dual school system with racially identifiable student bodies and faculties. Petitioners operated four white schools and one black school. In 1966, petitioners dismantled this dual school system and in the process determined not to renew the contracts of seventeen (17) teachers, all of whom were black. In doing so, petitioners dismissed on the eve of desegregation 70% of the black faculty in the district. With the exception of one teacher who substituted for a year and a half, respondents had each taught at least five years in the district and had on the average fourteen years experience with the district.

At issue in this case was whether the decision to dismiss 70% of the district's black faculty and retain 100% of its white faculty was racially based. In the appeal, the District

Court's account of the actual occurence of events was not disputed; rather its analysis and interpretation of those events were at issue.

The school board had a study prepared which showed that twelve (12) fewer teachers would be needed for the 1966-67 school year when the system would be desegregated. This staffing requirements study allegedly provided the rationale for discharging seventeen (17) black teachers. In actuality, only four fewer teachers were employed and the district hired at least seventeen new teachers to fill the vacancies left by the non-renewed black teachers and by retained white teachers who left the system. All of the new teachers hired were white. (A-4, A-42-A-43; A-6, A-61).

The superintendent did not recommend the seventeen black teachers for renewal at a meeting of the Board of Trustees held on March 8, 1966. He recommended all whites for renewal. Between March 1 and March 7, three of the white principals and the black principal prepared the annual Steck form evaluations of their teachers. The principals for the first time also rated the teachers on a scale from "2 to 10". The superintendent and curriculum director also rated all of the teachers, including those at the white school where the principal was absent, on this "2 to 10" scale.

At the trial of this matter, petitioners defended their dismissal of 70% of their black faculty claiming that it resulted from a racially neutral evaluation based on the Steck form/rating system by which all the teachers in the district were compared against their counterparts. The Steck form/ratings were due from the principals on March 7, and the recommendations for renewal were made the very next day.

It was undisputed, however, that prior to the March 8th recommendation to the Board, the black teachers -- only six of whom along with the black principal were retained -- had been subjected to two forms of "evaluation" which white teachers did not have to undergo. The superintendent and curriculum director, either of whom could control the outcome of the overall rating system, also were the individuals who subjected the black teachers to this special treatment.

First, only the black teachers were subjected to an "anecdotal evaluation" by the curriculum director prepared at the request of the superintendent. This "evaluation" focused on personal characteristics and emphasized racial considerations. (A-5, A-53).

Second, the black teachers were ranked against each other on the basis of perceived competence by the superintendent, the curriculum director and the black principal. Of the six black teachers retained along with the demoted black principal, five of them were the teachers ranked one to five by this ranking process and the sixth was the black principal's wife. The white teachers were not ranked against each other. (A 5-6,A-55). The worksheet upon which this black-against-black ranking was performed shows eight teachers receiving final scores. These eight ranked from one to seven with two tied for seventh place. No attempt was made to rank above seven. Only seven black teachers were rehired. (A-5).

On these undisputed facts, the District Court ruled in favor of the defendants. The district court "reconstructed" a comparison of the teachers on a system-wide basis using the ratings given by the superintendent, curriculum director and various principals. Based upon its "reconstruction", the District Court held that that process had been used to select the teachers who

would not be retained. (A55-56) The District Court in its findings discounted the evidence showing that the Board dismissed five more teachers than needed according to its alleged requirements study, that only blacks were non-renewed and whites were subsequently hired to replace them, that only blacks were subjected to the curriculum director's "anecdotal evaluation" and ranked against each other for the seven "most competent". It also discounted the subjective nature of the overall rating system and the clear ability of the superintendent and curriculum director to control the outcome of any comparative ratings by the scores they gave, which scores in fact were considerably lower for the non-renewed black teachers than those given by the principal who worked with them.

The Court of Appeals, after reviewing the record, reversed as "clearly erroneous" the District Court's findings that the employment decisions were based on a district-wide comparison using the Steck form evaluations and overall ratings. The Court of Appeals found that the evidence in the record showed intentional racial discrimination. (A7, A-11)

B. Procedural History of the Jurisdiction Issue

In 1966, when this action was filed, plaintiffs invoked the court's jurisdiction pursuant to 28 U.S.C. §1343, charging a violation of 42 U.S.C. §1983. After a jury trial which resulted in a limited finding in plaintiffs' favor, the District Court, inter alia, dismissed the action for failure to state a claim under §1983. 300 F.Supp. 794 (S.D. Tex. 1969). The Court of Appeals reversed the district court on this and other grounds and remanded for further proceedings. 427 F.2d 319 (5th Cir. 1970). After further proceedings the case was submitted to the District Court for decision in June 1972. In June 1973, this Court decided City of Kenosha v. Bruno, 412 U.S. 507 (1973), dealing with the scope of jurisdiction under §1983. The District Court asked the parties to brief the effect of City of Kenosha on the jurisdictional issue. Plaintiffs did so and also moved to amend their complaint to allege additional bases of jurisdiction.

The District Court in its January 1975 decision denied plaintiffs' motion in all respects. (A-36) The Court of Appeals reversed, holding that in light of 28 U.S.C. §1653 and Rule 15 of

the Federal Rules of Civil Procedure, the trial court abused its discretion in refusing to grant the portion of the motion to amend relating to 28 U.S.C. §1343(4) and 42 U.S.C. §1981. (A. 15).

ARGUMENT

This Petition does not present any issues which justify the granting of certiorari under Rule 19. There is no claim of a conflict of circuits, no issue of public importance and no plausible claim that the Fifth Circuit has failed to follow any applicable decision of this Court.

1. The Record On Appeal Was Adequate And A Remand On The Merits Unnecessary

The Court of Appeals held that the District Court's finding as to the decision-making process was clearly erroneous and overturned its conclusion that there was no racial discrimination against plaintiffs. The Court of Appeals decision applied Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U.S. ____, 95 S.Ct. 555, 50 L.Ed.2d 450 (1977). Petitioners argue that the Court of Appeals should be faulted because it applied Arlington Heights to the record

before it, instead of remanding to the District Court for further consideration. The Petition does not contend that the Court of Appeals incorrectly applied Arlington Heights, but only that the matter should have been remanded. We submit that the Court of Appeals was correct in avoiding still another delay in the disposition of this eleven year old case which was already before it for the second time.

Petitioners assert the broad proposition chat an appellate court must always remand to the the district court when an intervening decision has implications for resolving the issue at bar. Petitioners rely on three cases where remands occurred. In each of the cases, it is apparent that the court of appeals decided that the district court was in a better position than it itself to take additional evidence or arguments or otherwise to consider the issues or questions raised. These cases, however, do not stand for a broad requirement of deferring to the lower courts on all applications of intervening law as urged here by petitioners.

The record on appeal was fully developed and the issue of whether discrimination had occurred

extensively briefed and argued.[1/] There were no undeveloped facts or issues that required further fact-finding or presentation of evidence.

The Court of Appeals had no need to remand since it was in as good a position to analyze the evidence as the District Court and the District Court had been "clearly erroneous" in its past analyses. Reviewing the facts before it, the court came to the unanimous conclusion that the District Court "was clearly in error in finding that no intentional racial discrimination occurred in the non-renewal of plaintiffs' teaching contracts and in finding that the Steck Form/overall rating process was the method actually used to evaluate the teachers to arrive at the employment decision on March 8." (A. 11)

1/ The clear guidance provided by Arlington Heights in analyzing the record made it unnecessary for the Court of Appeals to rely on the developed case law on teacher dismissals during desegregation in order to reach this correct result. The District Court was in clear error in its application of the prior case law. See, U.S. v. Jefferson County Board of Educ., 372 F.2d 836 (5th Cir. 1966); Chambers v. Hendersonville City Board of Educ., 364 F.2d 189 (4th Cir. 1966); North Carolina Teachers Assn. v. Ashboro City Board of Educ., 393 F.2d 736 (4th Cir.

Petitioners' argument at page 8 of their Petition that the appeals court's decision undermines the integrity of Rule 52 of the Federal Rules of Civil Procedure is based on a faulty premise. Petitioners quote from this Court's decision in U.S. v. National Assn. of Real Estate Boards, 339 U.S. 485 (1950), to the effect that findings of fact should not be disturbed because they might be construed differently, unless they are clearly erroneous. The Court of Appeals unquestionably found the trial court to be "clearly erroneous". Since this basic requirement of Rule 52 was met, the decision in no way undermines the integrity of the Rule.

Moreover, the Court of Appeals did not dismiss extensive findings made by the trial court, as suggested by petitioners. The Court of

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1/ Cont'd
1968); Rolfe v. County Board of Educ. of Lincoln County, 391 F.2d 77 (6th Cir. 1968); Moore v. Board of Educ. of Chidester School District, 448 F.2d 709 (8th Cir. 1971); Jackson v. Wheatley School Dist. No. 28, 430 F.2d 1359 (8th Cir. 1970); Haney v. County Board of Educ. of Sevier County, 429 F.2d 364 (8th Cir. 1970). See also, Keyes v. School Dist. No. 1 Denver Colorado, 413 U.S. 109 (1973).

Appeals did not disturb the trial court's findings as to the occurrence and details of events. The trial court included in its findings many conclusions interpreting these events. The Court of Appeals overturned the District Court's findings only to the extent that they held that the decision not to renew these experienced but black teachers was based upon a district-wide comparison and that no intentional racial discrimination had occurred - the ultimate question posed by the lawsuit.2/ In light of the overwhelming evidence, the Court of Appeals found the District Court's "findings" on these ultimate questions to be clearly erroneous and reversed in favor of the plaintiffs on the merits.

2/ In the appeal, respondents adopted the "true facts" found by the district court but challenged its interpretation of those facts. Respondents argued that those were tantamount to conclusions of law and not entitled to the protection of Rule 52. The Court of Appeals, however, decided it need not address this issue since it found the trial court to be erroneous under the stricter standard. (A7, footnote 6).

2. Plaintiffs' Original Complaint Set Forth A Cause of Action Under 42 U.S.C. §1981 and Justice Required that Plaintiffs Be Allowed to Invoke the Court's Jurisdiction Pursuant to that Statute

Petitioners argue that the Court of Appeals erred in directing the trial court to allow plaintiffs' Motion to Amend. They base their argument on two contentions: (1) that 42 U.S.C. §1981 is not a jurisdictional statute, and (2) that §1981 is separate from §1983 and available to a narrower class of plaintiffs. Petitioners' argument, however, apparently overlooks three important factors which the Court of Appeals took into consideration : (1) the applicability of §1981 to respondents' claims, (2) the interrelationship between 28 U.S.C. §1343(4) and 42 U.S.C. §1981, and (3) the combined force of Rule 15(a) and 28 U.S.C. §1653.

The essence of petitioners' argument is that plaintiffs should be barred from obtaining full relief for the discrimination suffered by them in 1966 because they did not cite 42 U.S.C. §1981 in their original complaint even though they pled and proved a violation of the statute.

In their original complaint, plaintiffs set forth all the necessary facts to support a cause

of action under 42 U.S.C. §1981. Plaintiffs have always claimed that they were denied continued employment on account of their race. It is true that "§1981 is available to a much narrower class of potential litigants than §1983", Campbell v. Gadsden County District School Board, 534 F.2d 650, 654 (5th Cir. 1976), but plaintiffs are without a doubt members of that narrower class of victims of racial discrimination. Plaintiffs' Motion to Amend sought to include this additional cause of action statute.[3/] No new allegations of fact or prayers for relief were necessary since as the Court of Appeals stated:

> For eleven years plaintiffs, alleging the same facts, have sought the same relief from the same defendants. (A. 15)

3/ It is hornbook law that the jurisdiction of a federal court may not be defeated merely because the pleadings fail to cite the court to a particular jurisdictional statute. See Wright & Miller, Federal Practice and Procedure (1969) §1206, pp. 37-78.

Similarly the Courts have long held that a plaintiff is not required to state under what law he brings his action but only to plead facts which under any law entitle him to recover. Newberry v. Central of Georgia Railway, 276 F.2d. 337 (5th Cir. 1921) cert. den. 257 U.S. 662.

In a comparable situation, this Court has stated:

> Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits".

Conley v. Gibson, 355 U.S. 41,48 (1957). From the commencement of this action, the parties and the District Court have known that it was a suit to remedy employment discrimination on account of race.

The purpose of 28 U.S.C. §1653 is to allow the curing of defective allegations of jurisdiction. While §1981 is not a jurisdictional statute in the strictest sense, it is as a cause of action statute a necessary component of asserting jurisdiction under 28 U.S.C. §1343 (4). Moreover, asserting a cause of action under §1981 affects the court's jurisdiction to grant a remedy. The Court of Appeals properly recognized the jurisdictional nature of §1981, particularly

in combination with §1343(4). It was correct in applying §1653 to the situation at bar.

The Court of Appeals also found Rule 15(a) of the Federal Rules of Civil Procedure to be applicable to the instant matter. Under Rule 15(a) alone, plaintiffs' motion should have been granted. In the instant case, the prevailing legal authority at the time of filing was that adequate jurisdiction existed under §1983 to grant all the requested relief. It was seven years after this suit was filed that the defect became known. The mandate of Rule 15(a) that leave to amend "should be freely given when justice so requires" is to be heeded. Foman v. Davis, 371 U.S. 178, 182 (1962). In the instant matter, justice clearly required that plaintiffs who were victims of employment discrimination be allowed to invoke the full jurisidction of the district court to obtain the remedies they had been praying for since 1966.

CONCLUSION

For the foregoing reasons, the Petition for a

Writ of Certiorari should be denied.

Respectfully submitted,

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